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APR 14 2005

In re Application of : **OFFICE OF PETITIONS**
Muller, et al. : ON PETITION
Application No. 10/603,997 :
June 25, 2003 :
Docket No.: Bayer 10.019.2 REI :

This is a decision on the renewed "PETITION UNDER 37 CFR § 1.17(h) - INCORRECT FILING DATE ASSIGNED," filed September 16, 2004, wherein petitioners request that the above-identified application be accorded a filing date of June 25, 2003.

The petition is **GRANTED**.

The application was received by the USPTO on June 25, 2003. On September 5, 2003, a Notice of Incomplete Reissue Application was mailed indicating, *inter alia*, that the application had not been accorded a filing date because the specification was missing and the application did not include at least one claim in accordance with 35 USC 112. The Notice indicated that the filing date would be the date of receipt of the required specification and at least one claim. Any assertion that the specification and at least one claim were submitted or were not necessary for a filing date must be by way of petition (along with required petition fee).

On November 5, 2003, a response to the Notice of Incomplete Reissue Application was submitted. The response included, *inter alia*, a specification, including claims. On February 9, 2004, a Notice to File Corrected Application Papers was mailed. The Notice to File Corrected Application Papers indicated, *inter alia*, that the application had been accorded a filing date of November 5, 2003, but that pages 407-408 of the specification appeared to have been omitted. The Notice to File Corrected Application Papers permitted applicant to either: (1) promptly establish prior receipt in the PTO of the omitted items at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted item(s) in a and accept the date of such submission as the application filing

date. An applicant asserting that the items in question were in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted items and accept the date of such submission as the application filing date must file any omitted items with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such items and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the Notice (37 CFR 1.181(f)).

On April 5, 2004, a petition was filed wherein it was argued that the response submitted November 5, 2003 was complete in that pages 407 and 408 were included. The petition included a return postcard date stamped November 5, 2003 by the USPTO. Petitioners argued that the postcard date stamped November 5, 2003 served as evidence of the submission of the specification on November 5, 2003, including pages 407-408. The petition was submitted untimely as the Notice mailed February 9, 2004 set forth a non-extendible two month period of time for response. Nonetheless, the petition was treated on the merits in the decision mailed July 16, 2004.

The instant renewed petition was timely submitted September 16, 2004. The arguments and evidence submitted by petitioners on renewed petition have been considered and found persuasive. The USPTO file is the official record of the papers originally filed in this application. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence.

The Notice mailed September 5, 2003 indicated that a specification had not been received and thus the application was not accorded a filing date. The response submitted November 5, 2004 was not accompanied by a petition, petition fee, and evidence of receipt of the items cited as omitted in the Notice, specifically, a copy of a return postcard. Thus, upon submission of the omitted items, the application was accorded a later filing date of November 5, 2003. Furthermore, a Notice to Correct Application Papers was mailed February 9, 2004 indicating, *inter alia*, that pages 407-408 appeared to have been omitted from the submission dated November 5, 2003.

The petition submitted April 4, 2004 included a copy of the return postcard date stamped November 5, 2003. The postcard, as indicated in the decision mailed July 16, 2004, was not specifically itemized in accordance with MPEP 503. Thus, the

postcard was not deemed *prima facie* evidence of receipt of the pages in question. The petition did not include evidence that the specification was not omitted from the application papers submitted June 25, 2003.

The instant renewed petition, however, includes a copy of a return receipt postcard date stamped June 25, 2003, the date of submission of the application papers. The postcard is not specifically itemized in accordance with MPEP 503 insofar as specific number of pages for each component referenced thereon. However, the postcard indicates the enclosure of nine components, specifically referencing "Specification and Claims in double column copy of patent format."

It is the practice of the USPTO that the person receiving the item(s) in the USPTO will check the listing on the postcard against the item(s) being filed to be sure they are properly identified and that all the items listed on the postcard are presently being submitted to the USPTO. If any of the items listed on the postcard are not being submitted to the USPTO, those items will be crossed off and the postcard initialed by the person receiving the items.

There is no indication on the postcard date stamped September 25, 2003 that the application papers when received on June 25, 2003 by the USPTO were reviewed and that the specification was found to be missing because presumably had the specification been absent, such would have been indicated by the USPTO on the postcard returned to petitioners. Accordingly, the evidence when viewed in the light most favorable to petitioners, would seem to establish that the application was complete, i.e., specification present, upon submission on June 25, 2003.

Accordingly, the Notices mailed September 5, 2003 and February 9, 2004 are hereby **WITHDRAWN** and the petition to accord the application a filing date of June 25, 2003 is **GRANTED**.

Since the original pages 407 and 408 of the specification cannot be located in the Office, a supplied copy will be used for examination purposes.

As petitioners have established that the application was complete upon filing, no petition fee is due in connection with this matter. A refund of the previously submitted petition fee of \$130.00 has been requested from the Finance Office on petitioners' behalf.

This application is being forwarded to the Office of Initial Patent Examination for further processing with a filing date of June 25, 2003.

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3205.



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